

THE SAN LUIS OBISPO COUNTY PLANNING COMMISSION

AN ADVISORY BODY - NOT A LEGISLATIVE BODY

The Grand Jury has examined the San Luis Obispo County Planning Commission and reviewed certain of its recent actions. The current structure and operating rules of the Planning Commission allow its decision-making process to be manipulated by personal agenda.

We have also reviewed the legal basis for the Commission and the county's ordinances regarding establishment and operation of the Commission. (Please see Appendix A for excerpts of relevant sections of California laws.) The Grand Jury performed its inquiry with an eye toward examining the Commission's objectivity, accountability, consistency, responsibility, fairness, and the relationship of their actions to housing affordability. Following are our observations, findings, and recommendations regarding the San Luis Obispo County Planning Commission.

AUTHORITY

California Penal Code §925 states: “The grand jury shall investigate and report on the operations, accounts and records of the officers, departments or functions of the county.”

BACKGROUND

What a Planning Commission IS NOT

The planning commission, as constituted in San Luis Obispo County, is *NOT* a legislative body. Members are not chosen by the electorate, have no legislative, regulatory, or rule making authority, and each member serves in an advisory capacity at the pleasure of the Board of Supervisors. A planning commission is *NOT* a pulpit for pursuit of personal agendas and it is not a regulatory body.

What a Planning Commission IS

California counties are not required by state law to establish planning commissions. California law requires only that each county have a “planning agency.” The planning agency may be composed of the Board of Supervisors, a planning department, a planning commission, or any combination thereof.

California Government Code Section 65101 allows the formation of planning commissions for the purpose of advising the Board of Supervisors on issues in the unincorporated areas of the county:

From California Government Code §65101(a): “The legislative body **may** create one or more planning commissions each of which shall report directly to the legislative body. The legislative body shall specify the membership of the commission or commissions. In any event, each planning commission shall consist of at least five members, **all of whom shall act in the public interest....**” [*emphasis added*]

Planning commissions are just such advisory bodies. Although Government Code Sections 65102 through 65106 describe certain functions to be performed by *planning agencies*, neither the maximum size, nor the functions and duties of a *planning commission*, are dictated by state law.

The Board of Supervisors has wide discretion in assigning the functions and duties of a planning commission:

From California Government Code §65102: “A legislative body may establish for its planning agency any rules, procedures, or standards which do not conflict with state or federal laws.”

Because a planning commission is appointed and has official status as an agency of a county, commissioners are subject to all the rules and regulations which govern all public bodies in California including, but not limited to, rules regarding conflicts of interest, laws such as the Brown Act, and “sunshine” rules. In San Luis Obispo County each member's term on the commission coincides with the term of the Supervisor who nominated them and commissioners serve at the pleasure of the entire Board of Supervisors. Commissioners are required to “act in the public interest.” They are also subject to conflict of interest rules as set forth in the Fair Political Practices Act.

State law requires that certain decisions of a planning commission must be subject to appeal to the Board of Supervisors. Additional remedies for adverse actions of a planning commission are

also provided by both codified law and common law.

NARRATIVE

Genesis of the San Luis Obispo County Planning Commission

The current San Luis Obispo County Planning Commission was established by County Ordinance Number 2692 in 1994. Two earlier ordinances preceded the current ordinance with the earliest dating from 1966. While the current Commission is composed of only five members, one from each Supervisor's district, the 1966 ordinance authorized a total of nine members, including one at-large member to represent agricultural interests.

Rules of the Planning Commission

The Planning Commission has adopted rules for its meetings and proceedings. These rules are stated in the “*RULES OF PROCEDURE*” dated 11/15/99. This document is available for public use and review.

The Planning Commission meets regularly in open, public sessions to discuss matters brought before it. These matters concern such issues as zoning, general plan revisions, and applications for discretionary permits. County Counsel and representative of the planning department staff are available at each meeting to advise and present issues. Members of the public may be recognized and speak at meetings.

The number of voting members needed to take action on an item depends on the issue to be decided. Votes on the General Plan, Land Use Ordinances, and Coastal Zone Land Use require at least three votes in the affirmative to pass. All other issues may be decided by a simple majority where only three members are present.

All business of the Planning Commission must be conducted in open sessions and, to avoid the appearance of bias, commissioners are not to participate in *ex parte* contacts when deliberating and making decisions. According to the Government Code, any such *ex parte* contacts “...shall be reported to the Commission in open public session, including sufficient detail so as to provide adequate information to the other Commissioners and the public as to the substance of the

contact.”

Commissioners must not meet in a succession of “smaller than a quorum” meetings to discuss Commission business. This is defined as a “serial meeting” in the Brown Act. In other words, commissioners shall not confer with each other, one-on-one, outside public meetings to plan actions to be taken at public meetings.

It is the duty of the Commission to consider the evidence concerning issues brought before it and to deliberate only the issues at hand. It should not stray from examination of the facts of the issue under consideration into other areas of interest to individual members. Nor should the issues become a stepping-stone to pursue personal agenda. It is the duty of the Commission's members to consider the issues before it by fairly and impartially applying the requirements of county rules, regulations, ordinances, general plan requirements, and rules of the Board of Supervisors to make decisions on the project in question.

Types of Permits

There are two main categories of permit applications. Permit applications, which require only staff review and which do not require a public hearing, are referred to as “ministerial.” Applications for permits requiring only ministerial action can be approved and permits issued without Commission review or other public hearings. When an applicant has met the requirements of a ministerial review issuance of the permit is required.

The second category is referred to as “discretionary” and involves the application of established policy. Discretionary review is required when the issues surrounding an application are not clearly defined and gray areas exist: e.g., cases involving zoning variances, tract maps, and larger commercial and residential projects. In the case of discretionary permits the applicant must present plans and may make adjustments requested by the Planning Department staff before the staff can recommend approval of the application. This can be, and usually is, a long and expensive process. Once the staff has made a recommendation for approval, the application must then be evaluated by the Planning Commission. The Commission must decide if the facts of the case warrant issuance of the permit. If the Commission denies the permit the applicant can then appeal to the Board of Supervisors.

The process of obtaining a discretionary permit often adds costs in excess of tens of thousands of dollars to the base cost of a project. When the project is for housing, this additional cost must be recovered by building it into the price of the homes. It is also not uncommon for an applicant to spend large sums of money meeting the requirements of the planning staff review only to have the project rejected by the Planning Commission, or conditionally approved with expensive and, at times, onerous conditions attached to the approval. The applicant's options are then to either accept the conditions or, if denied, to drop the project, or appeal to the Board of Supervisors to override the Commission. This is definitely a contributing factor to the affordability of housing in this county.

Some Examples of Recent Actions of the Commission

The Grand Jury reviewed several recent actions of the Planning Commission where the Commission's actions either came under unusual public scrutiny, or where they were the subject of specific complaints received by the Grand Jury. Following are brief summaries and comments regarding select cases:

Cambria/San Simeon Plan – The Planning Commission and staff worked for several months prior to November 2005 to prepare the Cambria/San Simeon Community Plan Update. A number of issues, which might be of concern to the California Coastal Commission had been raised by one Planning Commissioner during the study period and had been either rejected or voted down by the other Commissioners. The day before the plan was scheduled for final action by the Planning Commission (an action which would eventually send the plan to the Board of Supervisors), the Planning Department received a letter from the Coastal Commission stating it had the same concerns which the Planning Commission had already discussed and rejected. A question arose as to whether there may have been a request to the Coastal Commission to intervene in the process in an effort to revive discussion of these already rejected issues.

On January 10, 2006, grand jury members contacted the Coastal Commission office to inquire whether there had been contact with any local Planning Commissioner and to question the timing of these last minute concerns. The grand jury members were told there was an order from Coastal Commission management to put the issues before the Planning Commission post haste.

However, when we attempted to discover who was behind the order and how the timing came about, we were unable to obtain definitive answers from the Coastal Commission staff and management.

Nipomo Housing Project – In this case the Planning Commission staff worked for some time with a developer to evaluate a proposed housing project in Nipomo. The project was for 38 homes spaced at ten homes per acre – exactly the density which local zoning called for. The developer had invested thousands of dollars in the design and approval process. He complied with all requirements set forth by the staff, conformed to all zoning regulations, met all other requirements and the planning staff had recommended approval of the project.

At a Commission hearing where the agenda called for discussion of this project only three of the five Commissioner members were present. The Commissioner from the South County (Nipomo) area was absent from the meeting. Two of the Commissioners present wanted to bring the project to a vote while the third Commissioner felt the vote should be delayed since the member from the Nipomo area was absent. Both the staff and the applicant also requested that the Commission not vote on the project at that meeting. However, with only three of the five Commissioners present, two Commissioners were able to force the issue to a vote and voted to deny the project. In this case these two Commissioners were able to kill a project, which, had the full Commission been present, might have been approved.

Based on a review of the transcript of this meeting, in the Grand Jury's opinion, it indicates that the insistence of these two Commissioners to rush the project to a vote while the Commissioner from the Nipomo area was absent appeared to be arbitrary, apparently preordained, and a deliberate attempt to exclude the absent Commissioner from voting on the issue. In the Grand Jury's opinion it also appears, based on the transcript, that discussions between Commission members and third parties may have taken place prior to the public hearing. If so, this could constitute a "serial meeting" as defined in the California Government Code. Upon appeal to the Board of Supervisors, the vote of the two Commissioners was overturned, the project was reinstated, and the permits granted.

PG&E and California PUC – The California Public Utilities Commission (PUC) reviewed a

PG&E application for replacement of steam generator and support equipment at the Diablo Canyon Nuclear power plant. The role of the PUC in this case was to determine whether the replacement was justified and whether PG&E could recover the costs from ratepayers. The project required a complete environmental impact report (EIR) for approval by the PUC which was the lead agency for creating this EIR. The PUC's final EIR was sent to the Planning Commission for use in its decision-making process regarding replacement of the steam generators.

The county's role in the process was to evaluate land use issues such as transport and storage of the generators, and construction of facilities to accommodate the replacement work. The only application pending with the county at this time concerned these issues integral to the planned replacement of the steam generators. The Planning Commission's discussions should have been limited to these land use issues.

In the opinion of the Grand Jury, it appeared that an attempt to turn this application into an issue of license renewal for Diablo (scheduled for the year 2014) was made by two Commissioners. Re-licensing of Diablo was not the issue before the Planning Commission and it is an issue over which the Planning Commission has no authority in any event. There was no application pending regarding re-licensing of the Diablo facility. It was not appropriate to attempt to turn this application hearing into an issue regarding possible future re-licensing of Diablo. One Commissioner's refusal to ultimately deal with the issue in a proper manner, and to create an issue regarding re-licensing, resulted in denial of the project and forced the entire issue to be appealed to the Board of Supervisors.

CONCLUSION

It appears that the Planning Commission has attempted to interject itself into matters over which it has no authority and, in the Grand Jury's opinion, has become a vehicle for pursuing the personal agenda of some of its members. Further, decisions often do not appear to be made in a fair, consistent, and impartial manner and appear to reflect personal bias rather than a fair and impartial review of the facts. The definition of "review of the facts" often seems to be selectively tailored to support a preconceived viewpoint rather than a search for the best and fairest solution to a problem. Decisions often appear arbitrary.

Applicants often do not have a clear understanding of the rules governing the Planning Commission's actions regarding issuance of permits. These rules and requirements for issuing permits often are a moving target and Planning Commission decisions do not reflect consistent application of the rules between different cases for the same or similar issues.

There appears also to be a lack of accountability for the Commission inasmuch as rules may have been broken and conflicts of interest may exist.

There is the appearance of a conflict of interest, if not an actual conflict, when the jurisdiction of the Coastal Commission extends to matters before the Planning Commission and one of the Commissioners is also an employee of the Coastal Commission.

The rules under which the Commission operates are vague, insufficient, often irrelevant, and are in need of substantial clarification and revision.

FINDINGS

Finding 1: Although each Planning Commission member is appointed by, and serves the Board of Supervisors as a whole, each individual Commissioner is, presumably, most aware of and most closely involved in, issues regarding the district represented by the Supervisor who nominated the individual member. Therefore, that member is the person most likely to be representative of the consensus of the majority of their district.

Finding 2: Under the present five-member structure of the Planning Commission it is possible, when only three Commissioners are present at a meeting, for two Commissioners to rule by simple majority vote in a manner contrary to the will of the majority of Commissioners were all five Commissioners present. This creates the opportunity for personal agenda to rule where fairness might otherwise dictate a different outcome.

Finding 3: An applicant for a discretionary permit has a *reasonable expectation* (albeit not a guarantee) that the requested permit shall be granted when all the County's published and stated

requirements for that permit have been fulfilled and the Planning Department staff has recommended that the permit be issued.

Finding 4: Conflicts of interest, or at least the appearance of a conflict, can arise when Commissioners are asked to decide issues where the best interest of the County, and its citizens, may conflict with the interest, intent, or desires of a Commissioner's employer. This is especially true where the Commissioner's employer can exercise regulatory authority in the County over issues coming before the county's Planning Commission.

RECOMMENDATIONS

Recommendation 1: The Board of Supervisors should require that the Planning Commission make every reasonable effort to consider the opinion of the Commissioner in whose district a project is located when deciding an issue regarding that project in that Commissioner's absence. (Finding 1)

Recommendation 2: The Board of Supervisors should increase membership on the Planning Commission to seven members from the current five members. The two additional members should be appointed at large from the county. A unanimous vote of the entire Board of Supervisors should be required for each at large appointee. A quorum of the Planning Commission shall then be not less than four members. Binding votes of the Planning Commission must be by a majority of eligible voting members. (Finding 2)

Recommendation 3: The Board of Supervisors should implement the following rules regarding Planning Commission decisions:

In a case where the Planning Commission votes to deny issuance of a discretionary permit and the applicant has met each of the following three conditions:

- The applicant has met each of the requirements and conditions of the County as set forth by the Planning Department staff for issuance of the permit(s) during the review process and,
- The applicant has complied with all published rules, regulations, and ordinances required for issuance of the permit(s) and,

- The County Planning Department staff has recommended that the permit(s) be granted.

If the applicant then appeals the denial to the Board of Supervisors, the current rules should be changed to reflect the following conditions:

- No charge shall be levied for the applicant's appeal.
- The Director of the Planning Department as an “interested person adversely affected,” (as defined in section 66452.5, subdivision (d) of the California Government Code) may file the appeal with the Board of Supervisors to overturn the Planning Commission's decision. (See also Attorney General's Opinion No. 88-803 – December 1, 1998).
- The Planning Department shall not be required to prepare new findings to support the Commission's position in denying the application and the Board of Supervisors shall review the decision based on the original findings and the stated reasons for denial by the Commission.

These rules should have effect only where the above three conditions have been met. To be binding the vote of the Board of Supervisors must be by a majority of eligible voting members. (Finding 3)

Recommendation 4: To avoid the appearance of conflicts of interest, and to assure the Commission puts the interest of the citizens of San Luis Obispo County first, the Board of Supervisors should implement the following rule:

When a Commissioner is confronted with an issue before the Planning Commission which same issue is subject to authority, or other direct interest of the Commissioner's employer, or in which that Commissioner could otherwise have a personal interest, that Commissioner must refrain from participating in the discussions and deliberations concerning that issue and must not cast a vote on any question concerning that issue. Nor should Recommendation 1 above be operative in this instance. (Finding 4)

Recommendation 5: The Board of Supervisors should implement the following rule regarding Planning Commission members:

Each Commissioner should be required to sign a “Conflict of Interest Statement” which

would operate to prevent conflicts of interest of an economic nature, conflicts resulting from incompatible offices, or the appearance thereof. The Statement should reference the FPPC Form 700 disclosure of economic interests of the Commissioner and should state who the Commissioner's employer is as well as any other economic interests relevant to a potential conflict. This Statement should be in addition to the requirements for filing of the Form 700. The Commissioner should agree in the Statement to refrain from participating in any issue before the Commission in which either they or their employer has an interest. Violation of the terms of the Statement should be grounds for immediate discharge from the Planning Commission. (See Appendix 'A' for a discussion and reference to the California Government Code regarding this Recommendation.) (Finding 4)

REQUIRED RESPONSES

- ⊖ **The San Luis Obispo County Department of Planning and Building: Due 05/25/06 (Findings 1 through 4 and Recommendations 1 through 5.)**
- ⊖ **The San Luis Obispo County Board of Supervisors: Due 06/26/06 (Findings 1 through 4 and Recommendations 1 through 5.)**

APPENDIX A:

REFERENCE EXCERPTS FROM THE CALIFORNIA GOVERNMENT CODE

66452.5 . . .

(a) through (c) . . .

(d) Any interested person adversely affected by a decision of the advisory agency or appeal board may file an appeal with the governing body concerning any decision of the advisory agency or appeal board. (See also Attorney General's Opinion No. 88-803 – December 1, 1998.)

. 82041. "Local government agency" means a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, **commission** or other agency of the foregoing.

87100. No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a **financial interest**.

87103. A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, **on the official**, a member of his or her immediate family, or on any of the following:

(a) . . .

(b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

(c) **Any source of income**, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

87105. (a) A public official who holds an office specified in Section 87200 who has a financial interest in a decision within the meaning of Section 87100 shall, upon identifying a conflict of interest or a **potential conflict of interest** and immediately prior to the consideration of the matter, do all of the following:

(1) **Publicly identify** the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required.

(2) **Recuse himself or herself** from discussing and voting on the matter, or otherwise acting in violation of Section 87100.

(3) **Leave the room** until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.

87200. This article is applicable to elected state officers, judges and commissioners of

courts of the judicial branch of government, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, **members of planning commissions**, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and to candidates for any of these offices at any election.

87300. **Every agency shall adopt and promulgate a Conflict of Interest Code pursuant to the provisions of this article.** A Conflict of Interest Code **shall have the force of law** and any violation of a Conflict of Interest Code by a designated employee shall be deemed a violation of this chapter.

87500. Statements of economic interests required by this chapter shall be filed as follows:

(g) Members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, **planning commissioners**, and members of the **California Coastal Commission**-one original with the agency which shall make and retain a copy and forward the original to the commission which shall be the filing officer.

(emphasis added)

ADDENDUM TO PLANNING COMMISSION REPORT

The method used in developing the Planning Commission Report was omitted from the original release of the report. Factual elements of this report were verified with both County Counsel and Planning Department.

METHOD

The Grand Jury:

- Obtained and listened to the recorded transcript of the Planning Commission session during which the Gray Trust project in Nipomo was rejected by the Planning Commission,
- Reviewed votes by the Board of Supervisors upholding appeals from Planning Commission decisions,
- Reviewed public records containing statements of Planning Commission members,
- Reviewed and verified with Planning Department staff the actions of the Planning Commission, and the public record of those actions, during sessions where the following items were docketed for action:
 - Gray Trust Nipomo project
 - Cambria/San Simeon Plan
 - PG&E application for replacement of steam generators
- Received explanations and guidance from County Counsel regarding interpretation of laws regarding planning commission functions and rules, differences between ministerial and discretionary permits, and the requirements for each,
- Reviewed and analyzed the letter from the California Coastal Commission regarding appointment of, and participation by, one of its employees on the San Luis Obispo County Planning Commission,
- Reviewed with county counsel the county's policy on conflict of interest statements and reasons for the county's policy of not advising commissioners regarding conflicts of interest,
- Obtained testimony from witnesses and subpoenaed documents,
- Reviewed California Government Code regarding establishment, status, authority, duties, definitions, and use of planning commissions as a part of the legally required Planning Agency of counties,
- Reviewed county ordinances, copies of which were supplied to us by the County Administrator, establishing planning commissions and the history of planning

commission use in San Luis Obispo County,

- Reviewed with County Counsel portions of the Map Act regarding required procedures and appeals from Planning Commission decisions, including this county's election to make planning commission decisions subject to appeal,
- Reviewed with County Counsel portions of the Fair Political Practices Act, and California Government Code, regarding planning commissions and their members,
- Reviewed the Fair Political Practices Act, and California Government Code, regarding conflicts of interest {especially CGC § 87103, (c)}, and open meeting laws,
- Reviewed the Planning Commission's own rules for operation,
- Obtained from and reviewed with County Counsel an Attorney General opinion regarding the authority of the Planning Director to act as an “interested person” adversely effected when making an appeal,
- Reviewed current county practices as regards the appointment of planning commission members,
- Interviewed, by telephone, Coastal Commission employees regarding contact with Planning Commission members, and
- Questioned Planning Department staff regarding reasons for extraordinary delays in obtaining permits,